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Supreme Court, U. S.
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In the Supreme Court

of the

United States

October Term 1972

No. 72-1643

CONTINENTAL CASUALTY COMPANY,
an Illinois Corporation,

Petitioner,

vs.

J. G. LINK & COMPANY, a Co-Partnership of J. G. LINK and ELMER F. LINK, WAYRYNEN FUNERAL HOME, INC., a Montana Corporation, and RAY WAYRYNEN and MRS. RAY WAYRYNEN,

Respondents.

Brief of Respondent J. G. Link & Company Opposing Petition for Writ of Certiorari

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The Respondent, J. G. Link & Company, a co-partnership of J. G. Link and Elmer F. Link, respectfully submits this brief opposing Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit:

ARGUMENT

1. *The decision of the Court of Appeals is clearly correct.*

The Court of Appeals had no choice but to rule as it did in view of the policy provisions that Continental had inserted in the insurance contract which Continental had issued to J. J. Link & Company.

Professional liability policies issued by insurance companies for civil engineers, surveyors, architects, and the like, generally follow one of two forms. The district court in *Samuel N. Zarpas, Inc., vs. Daniel J. Morrow*, 215 F.Supp. 887 (1963) stated the situation best when it said:

> "John J McCassin, an expert in insurance matters, testified that there are two types of Errors and Omissions Policies: the 'discovery' policy and the 'occurrence' policy. In a discovery policy the coverage is effective if a negligent or omitted act is discovered and brought to the attention of the insurance company during the period of the policy, no matter when the act occurred. In an occurrence policy the coverage is effective if a negligent or omitted act occurred during the period of the policy, whatever the date of discovery."

Having in mind that statement from *Zarpas*, which quite correctly sets forth the kinds of policies issued in this field of liability coverage, let us examine the language of the Continental policy. It provides:

> "IV. Policy Period, Territory
>
> (a) During the Policy Period
>
> The insurance afforded by this policy ap-

> plies to errors, omissions or negligent acts which occur within the United States of America, its territories or possessions, or Canada (1) *during this policy period* if claim therefor is first made against the insured (2) *during this policy period.*" (Emphasis and numbers supplied.)

Because of the foregoing provision, the Continental policy was neither a "discovery" contract, nor an "occurrence" contract. It was a hybrid -- an attempted combination of both.

The Court of Appeals, with this kind of language in the policy before it, was led inescapably to this conclusion:

> "A close examination of the contentions of each of the parties in this case suggests that even the appellee-insurer was uncertain whether his policy was of the nature of a "discovery" policy or of an "occurrence" policy. The insurer will not be permitted under these circumstances to claim the legal benefits of one type of policy, while denying the detrimental consequences of the same type of policy. Specifically, Continental cannot claim that the policy requires occurrence of an act or omission within the policy period for there to be coverage, and then deny that the policy is an "occurrence" policy to which R.C.M. Section 13-806 is inapplicable. Likewise Continental cannot claim that the policy requires discovery of an error or omission within the policy period and then deny that coverage exists even though information given during the policy period ultimately leads to a determination of liability against its insured."
>
> "We note in conclusion, that we need not decide whether this is an 'occurrence' policy or a 'discovery' policy. If it is an 'occurrence' policy, the insured would be entitled to coverage since suit was

> filed within the requirements of R.C.M. Section 13-806. If it is a 'discovery' policy the insured would be entitled to coverage since the ambiguity of the 'if' claim provision is to be construed against the insurer." 470 F.2d 1137, 1138.

The fact that Continental's policy was a hybrid, not capable fo being categorized as either a "discovery" or an "occurrence" policy, renders nugatory any argument by Continental that the result in the Court of Appeals should have been different.

For example, Continental makes the claim in its petition for writ of certiorari, that the decision of the Court of Appeals herein is inconsistent with a decision of the same court a few months earlier in *Cornell, Holland, Hayes & Merryfield, Inc., vs. Continental Casualty Company* (C.A.9, 1972) 465 F.2d 22. However, the precise question of the hybrid provision was not raised in that case.

Nor is the decision conflicting with any decision of the Montana Supreme Court, including those cited by petitioner, because the same precise question has not been decided by the Montana Supreme Court.

Petitioner's further claim, that the district court should have admitted "expert" testimony to show what the local, technical, or peculiar signification of the terms used meant in the industry, is of no avail because that hybrid provision is obviously unclear, and no amount of "expert" testimony can cure that defect. In other words, the district court, the Court of Appeals, and this

Court is in as good position as any "expert" to determine that the hybrid provision is an incompatible combination of terms, as far as Continental is concerned.

Thus, petitioner is not entitled to relief under part A of its brief (Petitioner's brief, pp. 10-14, inclusive.)

2. *Breach of Cooperation was not an Issue is this Case.*

Part B of petitioner's brief (pp. 14116) seeks to fault the Court of Appeals because it did not consider any issue of breach of cooperation by the insured under the insurance policy.

This purported ground for petition is invalid because there never was an issue of breach of cooperation in the case. Such an issue was not pleaded by Continental, and its own claims manager, Mr. Worthington, testified:

> "Q. The reason for denial of coverage was because he wasn't cooperating, in your mind?
>
> A. (Mr. Worthington) Well, I suppose we could deny it on that basis, but that wasn't our purpose. We didn't want to deny it on the basis of non-cooperation. If we were going to deny it, we wanted it to be on the merits of the case."
>
> (Trial transcript, p. 269.)

Because breach of cooperation was not an issue before the district court, it struck from its conclusions any purported breach of cooperation. The reason for the district court so doing is obvious. The Court of Appeals therefore correctly concluded that there was no

issue in the case concerning the breach of cooperation clause (470 F.2d 1139).

Surely the Court of Appeals is not at fault for not considering a matter that was not in issue in the case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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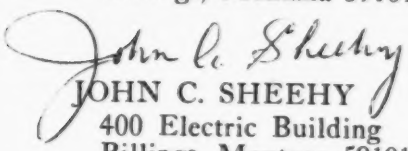

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